Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

RICHARD A. DeMATTEIS, JR.,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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67 pp

A. QUESTIONS PRESENTED FOR REVIEW

Whether the August 21, 1992, Memorandum Opinion of the Superior Court, Eastern District of Pennsylvania, which Petition was denied so deviates from and conflicts with the spirit of Terry v. Ohio, 392 B.S. 1, 88 S.Ct. 1868, and its legitimate progeny on this important Unites States Constitution Fourth Amendment issue as to require treatment by this Honorable United States Supreme Court.

B. PARTIES

All parties to the proceedings are listed on the cover of this document.

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D. OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE

(a) September 5, 1989 Opinion, Findings of Fact and Preconclusions of Law of the Court of Common Pleas, Judge Gailey Keller, denying pre-trial Suppression Motions;

(b) Trial Court Pa. R.A.P. 1925 Opinion, Post-Trial;

(c) The August 21, 1992 Memorandum Opinion of the Superior Court of Pennsylvania;

E. STATEMENT OF GROUNDS OF JURISDICTION:

Sought for Review are the Judgment of the Court of Common Pleas, Montour County, entered April 15, 1991; Judgment of the Pennsylvania Superior Court dated August 21, 1992, affirming; Order dated October 29, 1992 of the Superior Court denying Reconsideration; and the Order of February 14, 1994 of the Pennsylvania Supreme Court, Eastern District denying "Petition for Allowance of Appeal".

Jurisdiction is conferred by 28 U.S.C. SubSection 1254 ss.(1), and Supreme Court Rules, Rule 17(c).

F. This case principally involves the provisions of the Fourth Amendment to the United States Constitution which provides: "the right of the people to be secure in their persons, houses, papers, and affects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

G. CONCISE STATEMENT OF THE CASE

Mr. DeMatteis in the company of two other individuals was traveling in a vehicle which at approximately 7:00 o'clock A.M. on March 20, 1989 in Montour County pulled into a Texaco Gas Station owned by Mrs. Blue. Mrs. Blue observed that the individuals were "scruffy looking", and after delay one of the three had pumped gas she placed a call to the local State Police Barracks, fearing that she was not going to be paid. Trooper Barilar began to travel directly to the Texaco Station. While he was enroute one (1) of the three (3) individuals paid for the gasoline and the three (3) continued to travel. This was communicated by the gas station attendant

to the Police Barracks and radioed onto Trooper Barilar. Nonetheless, Trooper Barilar who was a social acquaintance of Mrs. Blue, visited with her at the gas station and it was pointed out to him that the vehicle including Mr. DeMatteis as a passenger was now parked at a Citgo Station directly across the street, which Citgo Station had a gift shop which the Texaco Station did not. Trooper Barilar stated that "it didn't make sense" that a person would go from one gas station to another, (despite the existence of the gift shop) and claimed that he was still fearing a possible robbery. He drove his police car across the street to the Citgo Station and parked so as to block the car in which Mr. DeMatteis was travelling.

He first made contact with two (2) individuals, one Mr. DeMatteis and the other a James Meredith, who was the manager of the Citgo Station, both emerging from a vehicle elsewhere in the parking lot.

Barilar testified that he was suspicious of Meredith, and thought that Meredith was lying when claiming that he was the manager of the station (he was). Barilar then forced Meredith to produce his driver's license and identification which he did. DeMatteis in the meantime went into the gas station premises and emerged shortly thereafter with another Co-Defendant Campbell who identified himself as the driver of the car. Barilar testified that as soon as

Campbell approached, Barilar could tell that he was concealing something beneath his leather jacket. Barilar asked Campbell to produce a driver's license and owner's card. As Campbell was in the process of complying Barilar questioned what was inside his jacket, Campbell indicated "nothing". The burglar alarm inside the gas station accidently went off. At approximately that time Meredith came out of the gas station saying that he had accidently tripped the alarm and at approximately the same time Barilar put one hand on his revolver and with the other patted Campbell's jacket and in so doing a nylon bag was located. Barilar unzipped the bag and found that inside was a towel and a bag containing the

suspected cocaine. Just about at the same time the third Co-Defendant Mr. Bonetti began to walk over toward Barilar; Barilar ordered all the men to place their hands on the hood of his vehicle, radioed for assistance. The three (3) ultimate Defendants complied. Mr. Meredith did not and was not forced to. Barilar proceeded to frisk all three (3) and in the process of frisking DeMatteis found suspected cocaine on him and a pipe. Co-Defendant Bonetti was found to possess a .357 Magnum weapon. All three (3) were arrested and DeMatteis charged not only with possession of the small amount of cocaine that was on his person but as well constructive possession of a large in excess of one

pound quantity in the possession of Mr. Campbell. Another arresting officer testified that inculpatory statements were made by one or all of the Defendants. DeMatteis in his original "Motion to Suppress/Dismiss" asserted that both the contraband and inculpatory statements were fruits of the poisonous tree.

H. STAGE AND PROCEEDINGS WHERE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The suppression issue was first raised in an "Omnibus Pre-Trial Motion" filed by DeMatteis on July 7, 1989. The Lower Court, Judge Keller in his Opinion of September 5, 1989, denied that Motion.

Please see pages 57 through 61 N.T. Preliminary Hearing (at Appendix). Cross-examination Barilar.

Also reaised in Post-Trial Motion. Raised as central issue on Appeal to Superior Court, "Application for Reargument", and "Petition for Review".

J. ARGUMENT

The right to be free from unreasonable searches and seizures is a fundamental constitutionally guaranteed right under the Fourth Amendment of the Constitution.

The Federal Courts have long recognized that if a warrantless search occurs it is incumbent upon the state to demonstrate that the police action fell within one of the well established exceptions of the warrant requirement (Cooper v. State (1976), 171 Ind. App. 350, 357 N.E. 2nd 260, 92 A.L.R. 3rd 36).

The Superior Court at page 7 of its Memorandum Opinion states, last paragraph, "stops", "frisks" and "pat-downs" on less than probable cause have

long been recognized as constitutional. The first United States Supreme Court case to carve out some fact oriented exception to the Fourth Amendment absolute prohibition against warrantless searches is Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In Terry the Court held that "where a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial

stages of the encounter serves to dispel his reasonable fear for his own or others' safety he is entitled for the protection of himself and others in the area conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which may be used to assault him". This Supreme Court held in Alabama v. White, 110 S.Ct. 2412, 110 L.Ed.2d 301, 309 (1990), that "reasonable suspicion" is a less demanding standard than probable cause in that reasonable suspicion "can arise from information that is less reliable than that required to show probable cause".

The Supreme Court also stated in Terry at 392 U.S. at 21, 88 S.Ct. at 1880 20 L.Ed. at 906 that: "in order to

establish the requisite justification for a stop based on personal observation the police officer must be able to point to specific and articulable facts which, taken together with rationale emphasis from those facts reasonably warrant an intrusion".

If the instant determination of the Superior Court of Pennsylvania, is allowed to stand, such critical elements of the narrow definition of exceptions to the Fourth Amendment protections such as "observes unusual conduct"..."which leads him reasonably to conclude in light of his experience that criminal activity may be afoot" and the mandate to conduct "a carefully limited search of the outer clothing of such persons in an attempt to

discover weapons" eroded.

The United States Supreme in Michigan v. Summers, 452 U.S., 692, 699, 101 S.Ct. 2587, 2592, 69 L.Ed.2d 340 (1981), in just slightly relaxing the Terry standard held that "some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as the police have an articulable basis for suspecting criminal activity".

In the instant case the information which caused Trooper Barilar to "stop" Defendant DeMatteis and his two comrades was at best related to the speculation of

Mrs. Blue that she was not going to be paid for gasoline. That concern obviously reasonably vanished upon her being paid. The officer claims to have been suspicious that the vehicle then traveled across the highway and stopped at another gas station, though as is evidenced by the appended excerpt of the transcript of preliminary hearing he acknowledged that the Citgo Gas Station across the street had a large sign on it which indicated "gift shop". Can it in any manner be deemed constitutionally reasonable or sanctioned by this or any other responsible Court that it be deemed suspicious behavior to stop at one gas station to gas up, and another to shop? This Supreme Court did in Commonwealth v.

Lovette, 103 S.Ct. 830, 74 L.Ed.2d 1025 (1983), by denying certiorari allow the determination in the State Supreme Court, Commonwealth v. Lovette, 498 Pa. 665, 450 A.2d 975 (1982) stand again reiterating the specific and articulable facts which give rise to reasonable suspicion of criminal activity standard. Indeed Officer Barilar had no business parking in or making any investigative stop of the three (3) individuals who were at the other gas station.

This aside, Officer Barilar after his original contact with Mr. DeMatteis and Mr. Meredith, who was in fact the gas station manager, who in fact Mr. Barilar never frisked, searched nor arrested but who is in fact the person who caused

further suspicions in the mind of Mr. Barilar, Mr. Barilar believing that Mr. Meredith was not the gas station manager encountered not only no specific and/or articulable fact which could give rise to a reasonable suspicion of criminal activity but quite the contrary. The gas station manager said everything was okay.

Further, getting past for a moment the obviously tainted nature of the "stop", the State Courts have "decided an important question of Federal law in conflict with applicable decisions of this Court" in that the scope of the frisk was over expansion. The trial testimony of officer Barilar in describing the size of the object inside Campbell's jacket was the size and shape

of half of a basketball.

Terry and its progeny was specific enough as regards limitations on the conduct of a protective search to indicate that it must be "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments", 392 U.S. F. 29, 88 S.Ct. at 1884, 20 L.Ed.2d at 911. In approving the scope of the search conducted in Terry the Court noted that: "Officer McFadden patted down on the outer clothing of Petitioner and his two (2) companions, he did not place his hands in their pocket or under the outer surface of their garments until he felt weapons and then he immediately reached for and removed the guns; he never did

invade Katz's person beyond the outer surface of clothing since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined the search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons' 392 U.S. F.29-30, 88 S.Ct. at 1884, 20 L.Ed.2d at 911.

When Trooper Barilar slapped the front of Campbell's jacket with the back of his hand he testified he felt something "firm" inside the jacket but he could not identify what it was, unlike the officer in Terry. Trooper Barilar did instead open Campbell's jacket, unzipped the black nylon bag and removed the contents from the bag without feeling

the bag to detect whether there might be any weapon inside.

What the Pennsylvania Courts in this case have decided is a far cry from the state of art as outlined by this Honorable Supreme Court. In the 1979 the United States Supreme Court case of Yubarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), the Court stated:

> "the officer may pat-down or frisk a suspect for weapons only if he reasonably believes that criminal activity is afoot and that the suspect may be armed and dangerous...nothing in Terry can be understood to allow... any search whatever for anything but weapon s (Yubarra supra. at 93-94."

In the instant case it is clear that:

(1) Officer Barilar did not have reasonable grounds to suspect that criminal activity was afoot;

(2) Did not have reasonable grounds to believe in the alternative that Mr. Campbell, with whom he would never had come into contact had he not made an illegal "stop", was "armed and dangerous";

(3) In the alternative exceeded the scope of admissible Terry frisk.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE - SERVICE
BY MAIL (S. CT. RULE 33 (3)(b))

I HELEN WANG, ESQUIRE, a member of the bar of the Supreme Court of the United States and counsel of record for RICHARD A. DeMATTEIS, JR., Petitioner herein certify that on _____, 1994, pursuant to Rule 33, Rules of the Supreme Court, I served (three copies) of the "Petition for Writ of Certiorari" on each of the parties herein as follows:

On ROBERT BUEHNER, ESQUIRE, attorney for Respondent herein, by depositing such copies in the United States Post Office, Bloomsburg, Pennsylvania, with first class postage prepaid, properly addressed to the post office address of ROBERT BUEHNER, the above-named Respondent's counsel of record at 29 East Main Street, Bloomsburg, PA.

All parties required to be served have been served.

Dated: 3/29/94 Helen Wang

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IN THE COURT OF COMMON PLEAS
OF THE 26TH JUDICIAL DISTRICT
MONTOUR COUNTY BRANCH, PENNA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO. 49 OF
	:	1989 and
vs.	:	NO. 60 OF
	:	1989
RICHARD A. DeMATTEIS, JR., Defendant	:	

ROBERT BUEHNER, JR., ESQUIRE, Attorney for the Commonwealth ESQUIRE, Attorney for the Defendant
FRED SHEPPERSON, Warden of Montour County Prision
MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant

ORDER

AND NOW, this 14th day of March, 1994, the Defendant's Petition for Allowance of Appeal to Supreme Court of Pennsylvania, Middle District having been denied, per curiam. Said Petition appealing the sentence of this Court dated April 15, 1991, it is Ordered that the Defendant shall present himself to the Montour County Prison, Danville, Pennsylvania at 9:00 a.m. on March 28, 1994 to begin serving said sentence.

BY THE COURT

HONORABLE GAILEY C. KELLER, P.J.

J. A24042/92

IN THE SUPERIOR COURT OF
PENNSYLVANIA
NO. 01583 Philadelphia 1991

COMMONWEALTH OF PENNSYLVANIA

vs.

RICHARD A. DeMATTEIS, JR.,
Appellant

ORDER

The Court hereby denies that application filed September 4, 1992, requesting reargument/reconsideration of the decision dated August 21, 1992.

PER CURIAM

DATE: October 29, 1992

IN THE SUPERIOR COURT OF
PENNSYLVANIA
NO. 01583 PHILADELPHIA 1991

COMMONWEALTH OF PENNSYLVANIA

V.

RICHARD A. DeMATTEIS, JR.,
APPELLANT

Appeal from the Judgment of Sentence April 15, 1991, In the Court of Common Please of Montour County, Criminal, No. 49-1989, 60-1989.

BEFORE: BECK, JOHNSON, and HUDOCK, JJ.

MEMORANDUM: FILED AUG. 21, 1992

The instant appeal requires us to visit once again the dimensions of a "stop and frisk" conducted with less than probable cause and to evaluate the circumstances under which such a procedure is constitutionally permissible.

Appellant Richard G. DeMatteis was arrested along with two companions, Larry Gene Bonetti and Braden Campbell, and each was charged with various counts of drug and weapons offenses. Although the

cases were not joined for trial, a consolidated omnibus pretrial hearing was held on August 15, 1989, at which appellant DeMatteis, Bonetti and Campbell sought to suppress physical evidence. The trial court denied the suppression motion. Subsequently, appellant was convicted of possession of a controlled substance, possession of a controlled substance with intent to deliver, possession of drug paraphernalia, and criminal conspiracy. Following the denial of post-verdict motions and the imposition of sentence, appellant took the instant appeal.

Appellant's principal challenge to his convictions is based on the trial court's denial of his motion to suppress both physical evidence and inculpatory statements. Appellant's claim is that all evidence used against him at trial

was traceable to the allegedly unlawful stop and frisk of his companion, Braden Campbell, from which the discovery of all inculpatory evidence flowed. We have thoroughly reviewed the record of the suppression hearing. We have considered the arguments made by appellant in support of his claims. We affirm.

Since appellant's claim of error is premised on the supposed illegality of the stop and frisk of his companion, Campbell, we review in detail the events leading up to that police action. The facts are as follows. State Trooper Steven Barilar received a frantic phone call from Rose Blue at about 7:00 A.M., March 20, 1989. Blue was the owner of a self-service gas station in Valley Township, Montour County. Blue was frightened and alarmed and explained to Trooper Barilar that three "scruffy-

looking" men in a brown car had pulled into her station and had pumped $10 worth of gas. Instead of paying for the gas right away, however, the three men sat in their car, talking amongst themselves and looking into the service station. After several minutes of this, Blue's dismay grew and therefore she called the state trooper barracks. Blue stayed on the line several minutes with Trooper Barilar, expressing to him her fear that the men were with going to leave without paying for their gas or rob her. Blue described the three men as unkempt and dirty-looking and she provided Barilar with the license number of the car they were driving. Barilar could tell that Blue was "very frightened", so he told her that he was on his way, and passed the phone to another state trooper. Blue was

instructed to keep talking to the second trooper while Barilar drove the short distance from the barracks to Blue's service station.

Meanwhile, as Blue was taking to the second trooper, one of the men in the brown car came over to Blue and paid the $10.00 for the gas he had pumped. Blue told this to the trooper on the phone. She also told him that the brown car then went straight across the street to another service station. The second station was a Citgo gas station and Blue could see the brown car parked there from her vantage point across the street. Moments later, Trooper Barilar arrived at Blue's station . Blue pointed out the brown car at the Citgo station to Barilar. Barilar also knew that the men had paid for the gas they had pumped at Blue's station.

However, "[i]t didn't make sense" to Barilar that "someone would go from one gas station where they got gas and then go to another gas station." Still fearing a possible robbery, Barilar drove across the street to the Citgo station and parked behind the unoccupied brown car. At first, the only people Barilar saw were two men emerging from another vehicle at the far side of the station. The men, later identified as appellant Richard DeMatteis and another man names James Meredith, approached Barilar.

Meredith did the talking. He appeared "very agitated" and Barilar was left with the impression that Meredith "wanted (Barilar) away from there." The trooper inquired about the brown car and its occupants, who were not in sight, and Meredith said that they were customers of his and that the trooper didn't have to

stay. Although Meredith told Barilar that he was the manager of the station, Barilar stated that in his mind Meredith's manner of dress belied the contention. Meredith was wearing a leather jacket, leather boots and blue jeans. Barilar testified that Meredith was "scruffy-looking" [sic] and "looked to [him] as one of those described as the three type individuals as Mrs. Blue stated". Further, Barilar noted that he had been to that service station before but did not recognize Meredith as one of its employees.

Despite Trooper Barilar's repeated request to Meredith to identify the driver of the brown car, Meredith declined. After the trooper made the request three or four times, DeMatteis went inside the service station and came out with Campbell, who identified himself

as the driver of the car. As soon as Campbell approached the trooper, Barilar could see that he was concealing something underneath the leather jacket he was wearing.

Barilar asked Campbell to produce a driver's license and owner's card. Campbell complied and the documents indicated that although he was the driver, he was not the owner of the vehicle. Meanwhile, as Campbell and the trooper talked, Campbell "kept his had over an object which was under his jacket". The trooper described the bulge as being right in the center front of the jacket and about the size of a loaf of bread. Barilar asked Campbell what he had under the jacket and Campbell stated that there was "nothing".

Immediately on the heels of Campbell's patently false response, an

audible burglar alarm went off. As soon as the trooper heard the bells start ringing he put his hand on his service revolver and reached with the other hand to feel whatever it was under Campbell's jacket. The trooper felt something there, unzipped the jacket, and saw a black nylon bag under the jacket. Fearing that Campbell was concealing a weapon in the bag and believing that a robbery was either in progress or had just occurred, Barilar unzipped the nylon bag. Inside was a towel and a bag containing a white powder, which was later determined to be cocaine. The package of cocaine fell to the ground and Trooper Barilar drew his gun.

At some point during this part of the incident, Meredith emerged from the service station and stated that he had accidentally tripped the alarm. Whether

this happened before or after Trooper Barilar unzipped the black nylon under Campbell's jacket is unclear from the record. Barilar first stated that Meredith came out of the station after he had unzipped the bag. Later, the testimony was that Meredith's explanation came just before the bag was unzipped. The trial court made no finding of fact regarding Meredith's statement about the alarm, presumably because the timing of the remark was unclear from the testimony. Trooper Barilar indicated that, in any event, he did not know who Meredith was and his testimony implied that he would not have put stock in the attempted reassurance. Moreover, as the following discussion of the issue demonstrates, the timing of Meredith's remark is not dispositive of the propriety of Barilar's actions. By

concentrating on the timing of Meredith's remark, appellant attempts to have this court carve up a rapidly unfolding event into minute parts and hinge our decision on any one aspect of the episode. This we refuse to do.

Just after the package of cocaine fell from Campbell's bad, the third co-defendant, Larry Bonetti, came toward Trooper Barilar. Bonetti was similarly dressed with a black leather jacket, had long hair and a mustache and, to Barilar, "looked rough." Barilar ordered all the men to place their hands on the car's hood, radioed for assistance and conducted a pat-down search of DeMatteis, Campbell and Bonetti. The frisk of DeMatteis yielded a golf-ball sized rocklike object which was found to be cocaine and an elongated pipe type object in the same pocket. Bonetti was

armed with a .357 Magnum weapon and also had a small amount of cocaine on him. The search of Campbell revealed nothing more than had already been discovered in the zippered bag. In a subsequent search of the car, the police seized a number of lighters, butane lighter fuel, a stainless steel cup, a bowl, a torch, wire, several pill containers, pieces of scouring pad, and a small scale. Meredith was not searched nor was he detained.

DeMatteis, Bonetti and Campbell were arrested and advised of their rights against self-incrimination. Later the men made incriminating statements indicating their involvement in the drug deal. Specifically, appellant told Trooper Gregory Hall that the three men drove to Montour County from the western part of the state, pooled their resources

and purchased a $10,000.00 supply of cocaine from James Meredith at the Citgo station.

Appellant was tried separately and convicted of possession of cocaine, possession with the intent to deliver, possession of drug paraphernalia, and conspiracy. As noted above, appellant's principal challenge goes to the trial court's denial of his motion to suppress evidence. His argument is premised on the contention that at the time the cocaine was uncovered by Trooper Barilar, the officer had no constitutionally recognized justification to stop Campbell or to frisk him and that the subsequent search of his own person, the car and the obtaining of the inculpatory statements were all tainted by the initial illegality. In light of the appropriate standards, we disagree.

In challenges to the rulings of a suppression court, our standard of review is well defined and narrow. We are limited to determining whether the factual findings of the lower court are supported by the record and whether the legal conclusions drawn from those facts are in error. Commonwealth v. Rodgers,--- Pa.Super. ---, ---, 605 A.2d 1228, 1237 (1992).

> In making this determination, we consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense, as, fairly read in the context of the record as a whole, remains uncontradicted. If, when so viewed, the evidence supports the factual findings, we are bound by such findings and may only reverse if the legal conclusions drawn therefrom are in error.

Commonwealth v. Chiesa, 329 Pa.Super. 401, 404, 478 A.2d 850, 852 (1984).

Stops, frisks and "pat-downs" on less than probable cause have been recognized

as constitutional. The classic formulation comes from the Supreme Court's first treatment of the issue in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968). In Terry, the Court held that:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and other in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Terry v. Ohio, 392 U.S. at 30-31, 88 S.Ct. at ---, 20 L.Ed.2d at 911.

In the twenty-four years since Terry

was decided, courts have sought to delineate the proper boundaries of police conduct undertaken on the basis of reasonable suspicion that criminal activity is afoot. Most recently, the Supreme Court has explained that: "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." Alabama v. White, --- U.S. ---, 110 S.Ct. 2412, ----, 110 L.Ed2d 301, 309 (1990). Many of the problems which arise in analyzing the legitimacy of police conduct are traceable to the

circumstances in which these encounters between police and citizens arise. Such incidents unfold quickly and in an environment which requires prompt action by police to avert potential danger to themselves and others. Courts struggle to strike a balance between the considerable peril which might result from hesitation on the part of the police and the unquestionable right of our citizens on the part of the police and the unquestionable right of our citizens to go about their business free from harassment and undue government interference. See Commonwealth v. Daniels, 280 Pa.Super. 278, ---421 A.2d 721, 724-725 (1980). In striking this balance, we are repeatedly admonished to take into account "the totality of the circumstances - the whole picture." See, e.g., United States v. Cortez, 449 U.S.

411, 417, 101 S.Ct. 690, 66 L.Ed2d 621 (1981). It is appellant's failure to appreciate this doctrine which constitutes his most profound difficulty on appeal.

This court recently had occasion to emphasize just this principle. When deciding whether reasonable suspicion of criminal activity was present, we stressed that "it is incumbent upon us to recognize and account for the fluid nature of events as they were perceived by the officers at the time." Commonwealth v. Epps, --- Pa.Super. ---, --- A.2d ---, No. 1316 Philadelphia 1991, filed June 18, 1992. In Epps, we held that a broken vent window alone provided an experienced police officer with sufficient constitutional justification to stop a car. Epps underscored the often unique ability of experienced

police officers to draw inferences and deductions which untrained persons might not be able to make. The officer's testimony in Epps was that his experience taught him that unlawful entry into automobiles was routinely gained by breaking the smaller, more discreet vent window instead of the larger, more conspicuous ones. This experience informed the officer's actions, reasonably allowing him to suspect criminal activity and justifying the actions he took pursuant to those suspicions. This court refused to ignore the experience of the officers and the realities of the criminal world and noted further that no delay in investigation would have been forgiven, under the circumstances. It is with the same degree of realism that we approach the instant case.

Appellant invites us to discount entirely the rapid, suspicious and volatile nature of events as seen and understood by Trooper Barilar. A highly agitated and frightened gas station attendant called Barilar to report her suspicions about a group of men assembled in a car at her station. Reacting to her fright, Barilar got in his patrol car and quickly traveled the distance to the station in twelve minutes. Meanwhile, although the occupants had paid for their gas at the first station, they went across the street to another gas station, which struck Barilar as odd. Still nervous about the group Barilar followed them there. When he first saw Meredith and DeMatteis coming towards him, Barilar took them for two of the three occupants of the original car. Appellant argues that even at this stage, he and his

companions were "seized" because the trooper had parked his car behind theirs. This argument is totally meritless. The car at the time was unoccupied and there was no evidence from which it was reasonable to infer that, had Barilar found everything to be in order, Barilar would have done anything except go on his way and his friends to do the same. When Barilar first pulled into the station he had not seized appellant and his companions by parking behind their empty car. However, subsequent events greatly escalated Barilar's initial cautious worries.

Furthermore, we do not need to speculate about what was going through Trooper Barilar's mind and whether the deductions he drew were reasonable in light of evolving events. Barilar testified specifically and repeatedly at

the hearing regarding the situation as he perceived it and the record supports the variety of facts which underlay his suspicions. Barilar stated that he did not recognize Meredith nor did he believe that he managed the station from the way Meredith was dressed. In fact, Barilar thought that Meredith and DeMatteis were two of the three suspicious individuals who had aroused the fears of Mrs. Blue. When Campbell emerged from the station, Barilar thought he had before him all three individuals seen by Blue.

Meanwhile, when Campbell approached Barilar he was obviously hiding something under his jacket, although when questioned he stated that the bulge was "nothing." Barilar knew by the size of the bulge that he was not seeing a part of Campbell's anatomy.[1] He also knew that it was not "nothing", as Campbell

maintained.[2]

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[1]Barilar explained that the bulge in the stomach area was not consistent with the rest of Campbell's physique or his facial features.

[2]Barilar stated that the size of the bulge was about that of a loaf of bread. When asked in cross-examination whether it could have been a loaf of bread, Barilar said that it was "a possibility". He added: "Well, if it was a loaf of bread, he would have said he had a loaf of bread under his jacket."

The situation turned still more urgent when the burglar alarm sounded. Barilar's immediate assessment of the situation given: 1) Blue's suspicions; 2) the men's appearance; 3) the fact that they traveled to a second gas station despite having just purchased gas; 4) Meredith's apparent interest in "getting rid" of the policeman; 5) Campbell's concealment of something under his jacket; 6) the absence of any uniformed attendant or anyone who did not seen to be with this group; and finally 7) the

sounding of burglar alarm, was that a "robbery had occurred and these people in front of [him] were the ones who did it. [He] was afraid that the owner was either gagged in the back or had been shot." It was this situation based upon these coalescing factors which caused Barilar to thrust his hand against Campbell's jacket, confirming what, of course, he already knew, i.e. that Campbell had lied when he said "nothing" was under there. With the burglar alarm still sounding, alone with three men he, at the time, reasonably suspected of robbery, Trooper Barilar acted to protect himself. He unzipped Campbell's jacket and revealed the black nylon bag concealed there. Seeing that the bag was large enough to hold a gun and unable to determine whether, in fact, the bag contained one, Trooper Barilar unzipped the bag. We

hold that under the totality of the circumstances, Barilar's actions were lawful. Once the cocaine fell to the ground, probable cause existed for Campbell's arrest and appellant does not content otherwise. Appellant argues that Barilar had no reason to search the bag because it was clear that no burglary was in progress and because he could have ascertained the contents of the bag some other way. We reject appellant's attempt to have this court second-guess the officer's actions and reassess the situation through the remote and disinterested perspective of a cold transcript. Instead we endeavor to view the circumstances through the eyes of the officer in order to determine the reasonableness of his conduct, which is, after all, the "essence" of the constitutional command. Commonwealth v.

White, 358 Pa.Super. 120, ---, 516 A.2d 1211, 1215 (1986) ("The essence of state and federal constitutional provisions as to search and seizure is reasonableness. ... A policeman who lacks the precise level of information necessary for probable cause is not required to simply shrug his shoulders and allow a crime to occur or a criminal to escape.").

Further, appellant bases his argument that Barilar's suspicions of a burglary were unfounded on the statement supposedly made by Meredith before the bag was unzipped that he had accidentally tripped the alarm. He argues that Barilar had no justification to frisk Campbell since Meredith's remark should have reassured him and dispelled his fears. However, Barilar's express testimony was that he did not accept Meredith's explanation nor did he know

who Meredith was. Under the circumstances confronting Barilar, this judgment was reasonable, and we hold that Barilar could act to protect himself and attempt to disarm the seeming burglars. The fact that the men were not actually engaged in a burglary but instead were transacting a narcotics deal is wholly irrelevant to the reasonableness of Barilar's conduct when he frisked Campbell. Therefore, we hold that the trial court did not err in admitting the cocaine retrieved from Campbell's bag.

Appellant also cannot complain about the subsequent search of his own person and the car. First, to the extent that his argument is wholly dependent on the illegality of the frisk of Campbell, the premises underlying it has not been eliminated. Moreover, we hold that, based on the same reasoning, Barilar's

search of appellant for weapons was likewise independently lawful. Barilar had frisked Campbell and the large package of cocaine had been discovered. A frisk of appellant and Bonetti was similarly justified at this point. Barilar's fears regarding the robbery had not been dispelled, he still had not ascertained the identity of the original occupants of the brown car, the situation was both threatening and confusing, and Barilar was out-numbered and out-sized by appellant and his companions. In addition, Barilar was now aware that a large scale narcotics transaction was involved. Barilar was surrounded by four individuals whose relationship to one another remained unclear and whose responsibility for the sounding burglar alarm was as yet not satisfactorily determined. It was not incumbent on

Barilar to first determine, if indeed he could, which of the men before him had been together at Blue's station in the brown car. The pat-down of all the men was justified by reasonable suspicions aroused by the facts described above. Hesitation on Barilar's part, given all the circumstances of the instant case, could have been folly.[3]

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[3] Appellant cites us to Commonwealth v. Hook, 313 Pa.Super. 1, 459 A.2d 379 (1983), but we find that case inapposite. In Hook, this court found that appellant there could not be arrested "simply for being in the company of an arrested man [who possessed a firearm]." 459 A.2d at 382. However, in Hook the men were simply companions and there were no other additional features to suggest criminal activity. Here, the men had been together at Blue's station, purchased gas but then went to a second gas station, one companion was acting suspiciously in concealing an item under his jacket, a burglar alarm sounded and no apparent employee of the gas station was to be seen.

Moreover, even if we were to find that the frisk of appellant was conducted

after an arrest, as opposed to a "stop and frisk", our result would not change. Appellant argues that at the point he was frisked there was no probable cause to place him under arrest. We disagree. It was clear to Barilar that at the time he searched appellant and the others, at least three of the four individuals before him had traveled a long way together,[4] had conferred for a suspiciously long time at Blue's service station, were attempting to avoid the police and that the driver of the car was in possession of an extremely large and costly amount of cocaine. Moreover, the matter of the burglar alarm remained unresolved. In our view, the stop, frisk and subsequent arrest of all parties were lawful after the package of cocaine was discovered.

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[4] Barilar had ascertained that the brown car had come from the Pittsburgh area and was not local.

Appellant argues in a conclusory manner that the evidence obtained as a result of the vehicle search (i.e. drug paraphernalia) and the incūlpatory statements were all tainted by the initial illegality of the stop and frisk. Since we find the initial search of Campbell and appellant to have been reasonable and lawful, we do not address the remaining arguments which are premised on a legal conclusion which this court rejects.

Finally, appellant argues that the evidence was insufficient to sustain the conviction of possession with intent to deliver. Preliminarily, we note that the notes of testimony of appellant's non-jury trial of January 10, 1991, have not been submitted to this court as part of the record. It is incumbent on appellant to supply the transcript and his failure is deemed a waiver of the claims

dependent on it. However, assuming that appellate/trial counsel's recollection of trial proceedings accurately reflects the Commonwealth's evidence, we conclude that the claim is meritless in any event.

Appellant's primary arguments are that he cannot be found to have been in constructive possession of the cocaine found on Campbell and that, therefore, intent to deliver was not proven. We disagree. The standard by which this claim must be judged is settled. We view the evidence in the light most favorable to the Commonwealth as verdict winner, and accept as true all evidence and all reasonable inferences therefrom, which if believed could properly support the verdict. Commonwealth v. Hughes, 521 Pa. 423, ---, 555 A.2d 1264, 1267 (1989). In order to uphold appellant's conviction for possession of cocaine with intent to

deliver, the Commonwealth must come forward with proof that appellant possessed a controlled substance, and did so with intent to deliver it. Commonwealth v. Cardona, 316 Pa.Super. 381, ---, 463 A.2d 11, 15 (1983). The intent to deliver may be inferred from an examination of all the facts and circumstances surrounding the case. Commonwealth v. Robinson, 399 Pa.Super. 199, ---, 582 A.2d 14, 17 (1990).

Although we operate without a trial transcript, it appears from an overview of the record and from counsel's recollection that DeMatteis admitted, in his statement to Trooper Hall, that he and his companions were acting in concert to obtain the large amount of cocaine seized from Campbell.

In the instant case, appellant and his co-conspirators admittedly traveled

half-way across the state of Pennsylvania, pooled their resources and purchased a pound of cocaine for $10,000.00. The same pound of cocaine has a street value of $40,000.00. Appellant concedes that possession of a pound of cocaine is enough to permit the fact-finder to conclude beyond a reasonable doubt that delivery was intended. Appellant somehow contends that it was impermissible for the fact-finder to rely on the statement he gave to Trooper Hall confessing to the drug deal. In the absence of the statement's unreliability or constitutional infirmity, neither of which applies here, we see no substance to appellant's contention.

Judgment of sentence affirmed.